CERTIFICATE OF DIVISION.

SUPREME COURT OF THE UNITED STATES.

No. 879.

THE UNITED STATES, PLAINTIFF

vs.

JACK McBRATNEY.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED AUGUST 17, 1881.

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1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on to wit, the 7th day of May, A. D. 1881, the same being one of the regular juridical days of the May term, A. D. 1881, of said court—present the honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court, to wit:

In the matter of the grand jury.

At this day come the members of the grand jury, heretofore and in the district court duly empaneled and sworn as such grand jury, to wit: Ezra Fairchild, foreman, Thomas Woodward, William Bambrick, Richard A. Pomeroy, George W. Clayton, Michael Callahan, Charles C. Collier, John W. Belcher, William P. Pollock, Henry Murrow, Alexander Alsebrook, William M. Crull, Chandler Potter, T. Danford, John Greenwood, Henry Emigh, William J. Curtis, John G. Lilley, and William S. Collins, and present to the court here the following true bills of indictment, to wit:

THE UNITED STATES OF AMERICA
vs.
JACK MCBRATNEY. } Murder.

2 (Endorsed:) "A true bill".
[Signed) EZRA FAIRCHILD, *Foreman.*

And thereupon it is ordered by the court, that a bench warrant issue without delay against the said Jack McBratney, returnable forthwith.

* * * * * * *

And thereupon the said grand jurors retire to their room to consider further of the matters before them.

And the said indictment is in words and figures as follows, to wit:

Indictment.

UNITED STATES OF AMERICA,
Eighth Judicial Circuit, District of Colorado, ss:

Of the May term of the circuit court of the United States, sitting in and for the district of Colorado, in the year of our Lord one thousand eight hundred and eighty-one.

3 The grand jurors of the United States duly selected, empannelled, sworn, and charged in and for the district of Colorado, upon their oath, present that on the twenty-fifth day of February, (A. D. 1881,) in the year of our Lord one thousand eight hundred and eighty-one, at the Ute Reservation in the district of Colorado, said Ute Reservation being a place within the exclusive jurisdiction of the United States, one Jack McBratney in and upon one Thomas Casey, then and there being, feloniously, willfully, and of his malice aforethought, did make an assault; and the said Jack McBratney, a certain pistol commonly called a revolver, then and there charged with gunpowder and divers bullets of lead, which said pistol he, said Jack McBratney, in his right hand then and there had and held, then and there feloniously, wil-

fully, and of his malice aforethought, did discharge and shoot off to, against, and upon the said Thomas Casey; and that the said Jack McBratney, with the leaden bullets aforesaid out of the pistol aforesaid, then and there by force of the gunpowder aforesaid, by the said Jack McBratney discharged and shot off as aforesaid, then and there, feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wounded him the said Thomas Casey, in and upon the left side of the belly of him the said Thomas Casey, and in and upon the left shoulder of him, the said Thomas Casey, and in and upon the back of the neck of him, the said Thomas Casey, giving to him, the said Thomas Casey, then and there, with the leaden bullets aforesaid, so as
4 aforesaid discharged and shot out of the pistol aforesa' by the said Jack McBratney, in and upon the left side of the belly of him, the said Thomas Casey, one mortal wound, and in and upon the left shoulder of him, the said Thomas Casey, one mortal wound, and in and upon the back of the neck of him, the said Thomas Casey, one mortal wound, of which said several wounds he, the said Thomas Casey, then and there instantly died. And so the jurors aforesaid upon their oath aforesaid, do say that the said Jack McBratney, him, the said Thomas Casey, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder contrary to the form of the statute of the United States in such case provided, and against the peace and dignity of the said United 'ates.

(Signed) EDWARD L. JOHNSON,
United States District Attorney.

(Endorsed:) 710. Circuit court. United States vs. Jack McBratney, A true bill. (Sg'd) Ezra Fairchild, foreman of the United States grand jury. Filed May 7, 1881. (Sg'd) Edward F. Bishop, clerk. Edward L. Johnson, U. S. attorney.

5 And thereupon and on the same day, to wit, the 7th day of May, A. D. 1881, a bench warrant was duly issued out of said court and in said cause, and the said bench warrant is in words and figures as follows, to wit:

Capias criminal.—United States court.

UNITED STATES OF AMERICA,
District of Colorado, ss:

The President of the United States of America, to the marshal of the District of Colorado, greeting:

We command you, that you take the body of Jack McBratney, if he shall be found in your district, and safely him keep, so that you have his body before our district court of the United States for the district of Colorado, at the court-house in the city of Denver, in said district forthwith, to answer unto the said United States of America, in a certain bill of indictment preferred against him in said court for murder.

And have you then and there this writ, with an endorsement hereon, as to the manner of which you shall have executed the same.

Witness the Hon. Moses Hallert, judge of our said district court, and the seal thereof, at the city of Denver, in said district, this 7 day of May, A. D. 1881, and of the Independence of the United States, the 104 year.

{ SEAL DIST. CT. } (S'g'd) EDWARD F. BISHOP,
{ U. S. COL. } *Clerk.*

(Indorsed:) Gen. No. 710. Circuit court of the United States, for the district of Colorado. United States of America vs. Jack McBratney. Criminal capias. The marshal will hold the defendant to bail in the sum of $. clerk, by , deputy clerk.

DISTRICT OF COLORADO, *ss:*

I have duly served the within by taking into custody the within named Jack McBratney, and bringing him before the court this 18th day of May, 1881, as I am therein commanded.

(S'g'd) P. P. WILCOX,
United States Marshal.

By
Deputy Marshal.

Fees: Service, $2.00.

Filed May 12, 1881. (S'g'd) Edward F. Bishop, clerk. By deputy clerk.

6 And afterwards, and on, to wit, the 12th day of May, A. D. 1881, the same being one of the regular juridical days of the May term, A. D. 1881, of said court—present, the honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order: Pleads not guilty.

THE UNITED STATES OF AMERICA
vs.
JACK MCBRATNEY. } Indictment for murder.

At this day comes E. L. Johnson, esq., district attorney who prosecuted the pleas of the United States in this behalf, and the said prisoner is brought to the bar of the court and S. E. Browne, esq., his attorney, also comes. And thereupon the said prisoner is brought into court and he is arraigned and this indictment here read to him and he is required to plead thereunto. Whereupon the said prisoner answers and saith that he is not guilty in manner and form as in and by this said indictment he stands charged, and of this he puts himself upon the country. And the said district attorney doth the like.

7 And afterwards, and on, to wit, the 19th day of May, A. D. 1881, the same being one of the regular juridical days of the May term, A. D. 1881, of said court—present, the honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order: Defendant granted process for witnesses at expense of United States.

THE UNITED STATES OF AMERICA
vs.
JACK MCBRATNEY. } Indictment for murder.

At this day comes E. L. Johnson, esq., district attorney, who prosecutes the pleas of the United States in this behalf, and the said defendant, by S. E. Browne, esq., his attorney, also comes. And the affi-

davit of the said defendant praying for process for certain witnesses having heretofore been read by the court and the court being now sufficiently advised in the premises:

It is ordered that subpœnas issue and be served at the expense of the United States for the following named witnesses on behalf of the said defendant, to wit: Ralph Kimball, Julius Guntus, Frederick Useless, Alexander Callahan, James Cowby, James Kyle, William
8 Daughtry, James Musgrove, William Casky, Thomas Kelly, Charles Like, Anderson, and James Stack.

And afterwards, and on, to wit, the 8th day of June, A. D. 1881, the same being one of the regular juridical days of the May term, A. D. 1881, of said court—present, the honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, assigned; and the honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order: Defendant granted process for witnesses at expense of United States.

THE UNITED STATES OF AMERICA
vs.
JACK MCBRATNEY. } Indictment for murder.

At this day comes the said prisoner in his own proper person, and by S. E. Browne, his attorney. And the affidavit of the said defendant praying for process for certain witnesses being now read to the court, and the court being now sufficiently advised in the premises, it is ordered that subpœnas issue and be served at the expense of the
9 United States, for the following witnesses on behalf of the said defendant, to wit: Ralph Kimball, Julius Gimtus, Frederick Useless, Alexander Callahan, James Cowby, James Kyle, William Daugherty, James Musgrove, William Casky, Thomas Kelley, Charles Like, Anderson, and James Stack.

And afterwards, and on the same day, to wit, the 8th day of June, 1881, the following additional proceeding was had and entered of record in said court and in said cause, to wit:

Order: Trial continued.

THE UNITED STATES OF AMERICA
vs.
JACK MCBRATNEY. } Indictment for murder.

At this day comes E. L. Johnson, esq., district attorney, who prosecutes the pleas of the United States in this behalf, and the said prisoner is brought into court, and S. E. Browne, esq., his attorney, also comes. And thereupon comes a jury, to wit:

1. Joseph A. Blake.	5. John Mellor.	9. Ambrose B. Manahan.
2. S. R. Thompson.	6. Samuel Dodd.	10. Israel B. Hatch.
3. M. C. Kirby.	7. Z. E. Hart.	11. Atwell Rennick.
4. James Davis.	8. Karl Edwards.	12. Suydenham Mills.

10 good and lawful men, and they are duly selected and tried, impannelled, and sworn to well and truly try, and a true deliverance make, between the United States of America and Jack McBrat-

ney, the prisoner at the bar, and a true verdict render according to the evidence.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment, when the further hearing herein is postponed until to-morrow, Thursday the 9th instant, at the hour of 10 o'clock, a. m.

And thereupon the said jurors are conducted to their room under charge of a sworn bailiff, there to remain to meet the court as aforesaid.

And afterward, and to wit, the 9th day of June, A. D. 1881, the same being one of the regular juridical days of the May term, A. D. 1881, of said court—present, the honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, assigned, and the honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order: Trial continued.

11 THE UNITED STATES OF AMERICA
vs.
JACK MCBRATNEY. } Indictment for murder.

At this day came again the said parties, by their attorneys, respectively, and the said prisoner is brought into court. And the said jurors being now all here, present and in the jury box, the trial herein is resumed and continued to the hour of adjournment, when the further hearing of the evidence herein is postponed until to-morrow, Friday, the 10th instant, at the hour of 10 o'clock a m.

And thereupon the said jurors are conducted to their room, under charge of a sworn bailiff, there to remain to meet the court, as aforesaid.

And afterwards, and on, to wit, the 10th day of June, A. D. 1881, the same being one of the regular juridical days of the May term, A. D. 1881, of said court, present the honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, assigned, and the honorable Moses Hallett, district judge, the following proceeding was had and entered of record in said court and in said cause, to wit:

Order Trial: Verdict.

12 THE UNITED STATES OF AMERICA
vs.
JACK MCBRATNEY. } Indictment for murder.

At this day come again the said attorneys, respectively, and the said prisoner is brought into court, and the said jurors being now all here present and in the jury-box, the hearing of the evidence herein is resumed.

And the said jurors having heard the evidence produced herein and the instructions of the court, retire to their room, under charge of a sworn bailiff, to consider of their verdict.

And afterwards, and on this same day come again the said jurors, and on their oaths do say, they find that the town-site of Irwin is west of the east line of the Ute Reservation, and within the boundaries of the

same, and they find the defendant guilty in manner and form as charged in the indictment.

And thereupon the said prisoner is remanded to the common jail of Arapahoe County to abide the further order of the court.

And thereupon and on the same day, to wit, the 10th day of June, 1881, a certain verdict was filed in said court and in said cause, to wit:

Verdict.

13 We, the jury, find that the town-site of Irwin is west of the east line of the Ute Reservation and within the boundaries of the same.

(S'g'd) M. C. KIRBY, *Foreman.*

We, the jury, find the defendant guilty in manner and form as charged in the indictment.

(S'g'd) M. C. KIRBY, *Foreman.*

(Indorsed:) No. 710. Circuit court. U. S. vs. McBratney. Verdict. Filed June 10, A. D. 1881. (S'g'd) Edward F. Bishop, clerk.

And afterwards, and on, to wit, the 11th day of June, A. D. 1881, came the said defendant, by Brown & Putnam, his attorneys, and filed in said court and in said cause his motion in arrest of judgment, and the said motion is in words and figures as follows, to wit:

Motion in arrest of judgment.

UNITED STATES OF AMERICA,
Eighth Judicial Circuit, District of Colorado, ss:

In the circuit court.

14 THE UNITED STATES *vs.* JACK MCBRATNEY. } Murder.

And now comes the said defendant, by Browne & Putnam, his attorneys, and moves the court to arrest the judgment upon the verdict of the jury heretofore rendered in said cause for the following cause, viz:

1st. Because the indictment in said cause shows that the alleged murder was committed on what is known as the Ute Reservation, a district of country shown also by said indictment to be within the State of Colorado.

2d. Because said court had no jurisdiction over the place where said alleged murder was committed to try the defendant.

(S'g'd) BROWNE & PUTNAM.
Atty's for Def't.

(Endorsed:) 710. Circuit court U. S. The United States vs. Jack McBratney. Motion in arrest of judgment. Filed June 11, 1881. (S'gd') Edward F. Bishop, clerk. Browne & Putnam, Denver.

And afterwards, and on, to wit, the 16th day of June, A. D. 1881, the same being one of the regular juridical days of the May term,
15 A. D. 1881, of said court—present, the honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Certificate of division of opinion.

THE UNITED STATES OF AMERICA
vs.
JACK MCBRATNEY. } Murder.

At a circuit court of the United States begun and held at the city of Denver, in and for the district of Colorado, on the first Tuesday of May, anno Domini one thousand eight hundred and eighty-one—present, the honorable Samuel F. Miller, a justice of the Supreme Court of the United States, assigned to said circuit, and the honorable Moses Hallett, judge of said district.

THE UNITED STATES OF AMERICA
vs.
JACK MCBRATNEY. } Indictment for murder.

The grand jurors of the United States duly selected, empaneled, sworn, and charged in and for the district of Colorado, upon their oath present, that on the twenty-fifth day of February (A. D. 1881) in the year of our Lord one thousand eight hundred and eighty-one, at the Ute reservation, in the district of Colorado, said Ute reservation being a place within the exclusive jurisdiction of the United States, one Jack McBratney, in and upon one Thomas Casey, then and there
16 being feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said Jack McBratney, a certain pistol, commonly called a revolver, then and there charged with gunpowder, and divers bullets of lead, which said pistol he, the said Jack McBratney, in his right hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off to, against, and upon the said Thomas Casey; and that the said Jack McBratney, with the leaden bullets aforesaid, out of the pistol aforesaid, then and there by force of the gunpowder aforesaid, by the said Jack McBratney, discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound him, the said Thomas Casey in and upon the left side of the belly of him, the said Thomas Casey, and in and upon the left shoulder of him, the said Thomas Casey, and in and upon the back of the neck of him, the said Thomas Casey, then and there with the leaden bullets aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid by the said Jack McBratney in and upon the left side of the belly of him the said Thomas Casey, one mortal wound, and in and upon the left shoulder of him the said Thomas Casey, one mortal wound, and in and upon the back of the neck of him, the said Thomas Casey,
17 one mortal wound, of which said several mortal wounds he the said Thomas Casey then and there instantly died.

And so the jurors aforesaid, upon their oath aforesaid, do say that the said Jack McBratney, him, the said Thomas Casey, in the manner and by the means aforesaid, wilfully and of his malice aforethought, did kill and murder, contrary to the form of the statutes of the United States, in such case provided, and against the peace and dignity of the said United States.

EDWARD L. JOHNSON,
United States District Attorney.

(Endorsed:) A true bill:

" EZRA FAIRCHILD,
" *Foreman of the United States Grand Jury.*

To which indictment the said defendant being duly arraigned on the twelfth day of May, A. D. 1881, pleaded not guilty.

And thereafter and on the eighth day of June, A. D. 1881, the said indictment came on to be tried before said court, and a jury, and the trial thereof having proceeded on the ninth and tenth days of June, A. D. 1881, the same being concluded on said last-named day, the said jury returned their verdict finding said defendant guilty in manner and form as in said indictment charged.

And upon the trial it appeared by the evidence that the said defendant is, and that said Thomas Casey, deceased, was a white man; and that the said murder was committed in said district within the
18 Ute Reservation, the said Ute Reservation lying wholly within the exterior limits of the State of Colorado.

And thereafter and upon the eleventh day of June, A. D. 1881, the said defendant moved, by his counsel, to arrest the judgment of said court upon said verdict.

And the said motion in arrest coming on to be heard at this term, the following question occurred, that is to say: Whether the circuit court of the United States sitting in and for the district of Colorado has jurisdiction of the crime of murder, committed by a white man upon a white man within the Ute Reservation in said district and within the geographical limits of the State of Colorado. On which said question the opinions of the said judges were opposed.

Whereupon, on the request of said defendant, by his counsel, that the question on which said disagreement has happened may, during the term, be stated under the direction of the judges and certified under the seal of the court to the Supreme Court to be finally decided, it is ordered that the foregoing abstract of the state of the pleadings, trial, verdict, facts appearing in evidence, motion in arrest, and statement of the point upon which the disagreement has happened, which is made under the direction of the judges, be certified according to the request of defendant's counsel, and the law in that case made and provided.

19 (Signed) SAM. F. MILLER,
(Signed) MOSES HALLETT.

UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the indictment, capias, verdict, motion in arrest of judgment, and all the orders of court heretofore filed or had and entered of record in said court, and in a certain cause lately in said court pending between the United States of America and Jack McBratney, as fully and completely as the same still remain on file or of record in my office.

In testimony to the above, I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 30th day of July, A. D. 1881.

[SEAL] EDWARD F. BISHOP, *Clerk.*

Cost of transcript: 39 fol's, at 10c., $3.90; certificate, 35—$4.25 paid by United States.

(Indorsement on cover:) No. 879. The United States, plaintiff, vs. Jack McBratney. Certificate of division. Colorado C. C. U. S. Filed 17th August, 1881.

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

THE UNITED STATES
v.
MCBRATNEY.
No. 879.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

THE UNITED STATES
v.
MCBRATNEY. } No. 879.

BRIEF FOR THE UNITED STATES.

At May term, 1881, the defendant was charged, in the usual terms, with the murder of one Casey, "at the Ute Reservation in the district of Colorado, said Ute Reservation being a place within the exclusive jurisdiction of the United States." Having been convicted, a motion was made in arrest of judgment, and thereupon the following question occurred (folio 18), "Whether the circuit court of the United States sitting in and for the district of Colorado has jurisdiction of the crime of murder committed by a white man upon a white man within the Ute Reservation in said district, and within the geographical limits of the State of Colorado; on which said question the opinions of the said judges were opposed."

A statute which has long been in force renders the crime of *murder* cognizable by the United States when committed "within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States." (Rev. Stat., sec. 5339, paragraph 1.)

Another statute in force since 1834 provides that "Except as to crimes the punishment of which is expressly provided for in this Title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country." (Sec. 2145.)

As there is no *express provision* for the punishment of murder in the title referred to, it follows, by collating the two sections just quoted, that this crime is cognizable by the United States when committed within the *Indian country.*

And, by section 629, paragraph 20, of the Revised Statutes, it follows further that the *circuit court* is the tribunal which has jurisdiction thereof.

It remains to inquire whether the *Ute Reservation in the District of Colorado and within the geographical limits of the State of Colorado is Indian country.*

The term *Indian country* was formerly, by the act of 1834, section 1, expressly defined for all the purposes of that act, and therefore, as section 2145 (above) was in substance originally the 25th section of that act, for all purposes of the present inquiry. Adopting a conclusion in Bates *v.* Clark (95 U. S., 204), that definition, as modified by the logic of subsequent events up to the time of the adoption of the Revised Statutes, was, so far as here

applicable, *all that part of the United States west of the Mississippi in which the Indians retain their original title to the soil.* Bates *v.* Clark was decided at October term, 1877, but upon referring to the original record it appears that the *seizure* therein complained of was made in February, 1873, before the adoption of the Revised Statutes. (And see section 5598.)

Although the above definition has not been expressly brought forward into the Revised Statutes, yet inasmuch as the term *Indian country* has been so brought forward in repeated instances (sections 2129 *et seq.*) it seems that the definition has survived the section which contained it, either because it is a prospective declaration by the political department upon a matter exclusively within its jurisdiction, which in the course of time has substantially (see Bates *v.* Clark) become engrafted upon the term of art in question, or because it is a definition at which courts would have arrived even under common-law rules for interpreting statutes. The term was comparatively but little used before the year 1834, and upon introducing it then extensively into legislation Congress wisely defined it. That definition has, *by force of subsequent usage*, become so connected with the term that until the legislature shall *positively* change it it must continue to be recognized. That the *usage* in question originated in a *statutory* definition not now in existence does not affect the ordinary consequences of usage.

Again, it may be said that inasmuch as the Ute Reservation is a part of the lands ceded to the United States by Mexico, in 1848, it was not "part of the United States west of the Mississippi," within the act of 1834.

To this the reply is that the act of 1834 was *organic*

as regards the matters therein contained, and indicated a universal policy upon those matters for all Indians, and all territory that the United States might at any time control, and which should otherwise fall within its terms. The course of thought in Holliday's case, 3 Wallace, 414, upon the application of the Judiciary Act of 1789 to the jurisdiction of the circuit court over crimes against the United States defined by subsequent statutes, is pertinent here.

Besides this there is also the provision in the act which organized the territory of Colorado (usual in such cases), "That the Constitution *and all laws of the United States which are not locally inapplicable* shall have the same force and effect within said Territory of Colorado as elsewhere within the United States." (12 Stat., p. 176, sec. 16.)

It remains to inquire whether, for the purposes in question, the Ute Reservation ceased to be *Indian country* upon being incorporated within the geographical limits of the State of Colorado.

It appears that by the terms of the organizing act this reservation was *expressly* excluded from the Territory of Colorado (12 Stat., 172), but that the act which authorized the admission of Colorado as *a State* makes no such exception. (18 Stat., 474.)

It is submitted that nothing of importance in questions like the present turns upon such express exceptions or such silence. The duty of the United States to tribal Indians and their power over them are *fundamental* in our system; and as these are in point of law not *fortified* by express recognition thereof in statutes, so also they are not *lessened* by silence. To adopt language in the great case of Ableman *v.* Booth (21 How., 516),

those constitutional duties and powers by the nature of our system are marked off from the duties and powers of all other political persons as perfectly "as if the line of division was traced by landmarks and monuments visible to the eye."

Holiday's case (3 Wallace, 407) is one in which the defendant has been indicted in a United States court for selling liquor to a tribal Indian within the State of Michigan, *not* within a reservation, or within any place entitled to be considered Indian country. Upon the main question in the case, the court say:

> If commerce or traffic or intercourse is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress, although within the limits of a State. The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic or the locality of the tribe or of the member of the tribe, with whom it is carried on (p. 418).

In the Whiskey case (93 U. S., 188) the spirits a forfeiture of which was sought had been introduced into a place within the State of Minnesota that had been *ceded* in 1863 by the Chippewa Indians upon condition that the laws of the United States in force against the introduction of spirituous liquors into the Indian country should continue so after such cession.

The acts *admitting* Minnesota (11 Stat., 166 and 286) made no express exception as to its jurisdiction over all territory included within its geographical boundaries.

Although by the cession general jurisdiction of the place was immediately vested in the State, yet the express provision in question conferring federal jurisdiction was upheld as a proper incident to a treaty, and

also as within the constitutional grant of power over commerce with Indian tribes. The court say (p. 197):

> The fact that the ceded territory is within the limits of Minnesota is a mere incident; for the act of Congress imported into the treaty applies alike to all Indian tribes occupying a particular country, whether within or without State lines.

It is established, then, by these recent cases (which herein only apply doctrines asserted in the early cases against the State of Georgia, 5 Pet., 1, and 6 Pet., 515), that the incident that the duty which the United States owe to an Indian tribe is to be performed within State lines is of no importance. It follows that the creation of a State government with boundaries that inclose Indian country is an incident of no importance as to that duty. *That* remains undisturbed.

The "commerce" with Indian tribes whose regulation the Constitution intrusts to Congress has for many years been admitted by this court to be a most extensive topic. It has long been said to include *intercourse*. A question arises here as to what may be included in *intercourse*.

I submit that as the power to regulate such *intercourse* includes amongst other things the power of creating an *Indian country*, so also it does that of regulating the police of such country in all respects; especially over *intercourse* not subject to mere *tribal* jurisdiction, such as that of Whites with Indians, and of Whites with Whites.

The act of 1834 (ch. 161), in which, as has already been said, the provisions now under discussion originally appeared, is entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." The phraseology of the second clause of this title vindicates, no less than that in the first, the

right and duty of the United States to punish murder committed in Indian country by one White upon another; for, in the nature of things, the *peace* which exists in such country is, to quote the language of the indictment, "the peace *of the United States*," and not *of the State*. It is not a topic which it is necessary to urge here, but notwithstanding I may suggest that this court will easily see how *fit* it was (merely as a matter of *intercourse with Indian tribes*) that peace and good order among strangers within their *country* should be preserved *by the United States*. Fit or unfit, however, it is a matter of policy in the treatment of such tribes, and therefore has been intrusted to the determination of Congress. The subject-matter is merely *Federal*, and therefore unaffected by the presence of a State; it is also merely *political*, and therefore the treatment of it is in general beyond the censure of a court.

In accordance with this course of argument are the provisions in the Ute Treaty of March 2, 1868. (15 Stat., 619.)

By article II the United States *agree* that a district of country therein specified "shall be, and the same is hereby, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States hereby solemnly agree that no persons, except those herein authorized so to do and except such officers, agents [&c.], shall ever be permitted to pass over, settle upon, or reside in the territory described in this article except as herein otherwise provided."

In article XII (fourth paragraph) it is also provided that "The United States may pass such laws on the subject of alienation and descent of property, and on all subjects connected with the government of the Indians on said reservation, *and the internal police thereof*, as may be thought proper."

The course of reasoning in the cases cited above extends, as is submitted, to prevent the act for admitting Colorado from being interpreted as in any respect contradicting those provisions of the former which seclude the territory reserved from invasion by strangers. It is also submitted that the word "thereof" in the clause above italicised in article XII relates to the word "reservation" just preceding; and that *policing*, under statutes *at that time in force*, as well as under such as might afterwards be passed, is therein included.

S. F. PHILLIPS,
Solicitor-General.

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UNITED STATES OF AMERICA.

IN

SUPREME COURT,

OCTOBER TERM, A. D. 1881.

THE UNITED STATES
vs.
JACK McBRATNEY,
} INDICTMENT FOR MURDER.

The defendant was prosecuted for murder before the Circuit Court of the United States for the district of Colorado, at the October term, 1881, and convicted. The cause comes into this court on a certificate of division of opinion between the Hon. S. F. Miller, justice of this court, who presided at the trial, and the Hon. Moses Hallett, judge of the District Court of said district, who

sat with him. The only question for consideration in this court is one of jurisdiction, which arises upon said certificate.

The defendant alleges that however guilty he may be of the crime charged against him, the Circuit Court of the United States aforesaid had and has no judicial or constitutional authority to try or punish him.

The defendant is a white man, as was also the deceased. It is shown by the record, and found by the verdict of the jury that the homicide was committed on the Ute reservation, which reservation was also shown by the indictment and other proceedings to be within the boundaries of the state of Colorado.

After conviction defendant moved in arrest of judgment the want of jurisdiction in the federal court to try and punish him for the alleged offense. In support of this motion the counsel for the prisoner, S. E. Browne, cited the following authorities:

Worcester vs. Georgia, 6 Pet., 516.
U. S. vs. Bailey, 1 McL., 234.
U. S. vs. Cisna, 1 McL., 254.
U. S. vs. Rodgers, 4 How., 567.
N. York vs. Dibble, 21 How. 366.
U. S. vs. Ward, 1 Wool. 17.
U. S. vs, Stahl, 1 Wool. 192.
U. S. vs. Bereen, 3 Wheat. 386.
License cases, 5 How. 588.
Bates vs. Clark, 5 Otto, 204.
Yellow Suns case, 1 Dil. 271.
Sloan's case, 4 Saw. 331.
Doxtatter's case, 47 Wis. 294.
McCrackan vs. Todd, 1 Kan. 148.

The Colorado Enabling Act, approved March 31, 1875, provides for the admission of the State, "upon an equal

footing with the original States, *in all respects whatsoever.*" This language is precisely the same as the language of the act for the admission of Nebraska under which the Yellow Sun case was decided by Dillon J., and the Nevada Act, referred to in Sloan's case. There was no reservation of the assumed jurisdiction in the act, nor can such jurisdiction be found in any treaty between the Colorado Ute Indians and the Government of the United States. The Kansas Act under which the Ward case was decided provided as above, but also contained the further provislon that the State was not "to include any territory, which by treaty with such Indian tribe, is not without the consent of such tribe to be included within the jurisdiction of any State or Territory." In the territory included within the ulterior boundaries of Kansas, certain tribes of Indians had treaties with the United States containing this proviso. The second section of the Colorado Act fixes the ulterior lines of the State without such proviso or any limitation to the jurisdiction of the State Courts.

It is manifest from the language of His Honor Justice Miller, at page 23. 1st Wool. R., that where no such proviso is found in the enabling act of a statue, or at farthest in any treaty with an Indian tribe, the territory occupied by such tribe comes under the exclusive jurisdiction of the State tribunals for the punishment of all crimes committed on the Indian lands included in her boundaries.

In the language of said report, "all territory which was not covered by such treaties was included within the State, within its jurisdiction and within its territory."

But we think the Ward case and the Stahl case argue this question in more apt terms than we can hope to employ and we leave the question with a reference to these opinions.

The jurisdiction of the Federal Court is sought to be maintained in this case by the treaty of 1868. By section

6 of this treaty it is provided that "If bad men among the whites, or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs, at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured person for the loss sustained. If bad men among the Indians" (a comprehensive term, meaning *all Indians*) "shall commit a wrong or depredation upon the person or property of any one, white, black or Indian, subject to the authority of the United States and at peace therewith, the tribes herein named solemnly agree that they will, on proof made to their agent, and notice to him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws."

It will be seen by this stipulation that the right reserved to the Federal Courts to try and punish is limited to two classes: First, to bad white men who commit wrongs upon the Indians; secondly, to *bad* Indians who commit wrongs upon any one. There is no provision for the trial of a bad *white* man who assails the person of another *white* man upon the reservation. In the case under consideration the murder charged in the indictment was committed by one white man upon the person of another white man. The treaty fails to reserve to the Federal Courts the right to punish for the crime, and therefore the judgment of the Court must be arrested upon the verdict of the jury.

THOMAS G. PUTNAM,
S. E. BROWNE,
Attorneys for Defendant.

IN THE

SUPREME COURT

OF THE

United States of America.

October Term, A. D. 1881.

THE UNITED STATES,

vs.

JACK McBRATNEY.

INDICTMENT FOR MURDER.

THOMAS G. PUTNAM,
S. E. BROWNE,
Attorneys for Defendant.